(2449(1)

Supreme Court of the United States

OCTOBER TERM, 1954

No. 423

HARRY SLOCHOWER,

Appellant,

against

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS APPEAL

January 3, 1955

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The appellant was an Associate Professor in one of the public colleges maintained by the City of New York. His employment was terminated pursuant to New York City Charter § 903 when he invoked the Fifth Amendment to the Federal Constitution as the basis for refusing to testify concerning alleged Communist Party membership or activity.

In the courts of New York State this appeal was joined to, and argued with, the proceeding entitled *Matter of Daniman* v. *Board of Education of the City of New York*, 306 N. Y. 532 (1954). A Jurisdictional Statement was filed in this Court on behalf of the petitioners in the *Daniman* proceeding on September 28, 1954. The Board of Education of the City of New York submitted a motion to dismiss the appeal in the *Daniman* proceeding on November 5, 1954. This Court has not yet indicated whether or not probable jurisdiction of this case will be noted.

In the *Daniman* proceeding as well as in this appeal, the Court of Appeals of the State of New York: (1) upheld the constitutionality of New York City Charter § 903; (2) found that teachers employed in the public schools and public colleges maintained by the City of New York were city employees within the meaning of Charter § 903; (3) determined that the Internal Security Sub-Committee of the Committee on the Judiciary of the United States Senate was a duly constituted investigating body within the meaning of Charter § 903.

The petitioners' motion to reargue was denied by the New York State Court of Appeals (307 N. Y. 806). Except as to the present petitioner, the alternative motion for amendment of the remittitur was denied on the ground that no Federal constitutional question had been presented to the State Courts by the petitioners in the *Daniman* proceeding.

As appears in the *per curiam* memorandum set forth as an appendix (p. 27) to petitioner's Jurisdictional Statement, the remittitur was amended by the Court of Appeals to show that this appellant had presented certain Federal questions. The Court held unanimously that the petitioner had not been denied due process under the Fourteenth Amendment.

In addition to the *Daniman* appeal, discussed *supra*, the question of the constitutionality of § 903 of the New York City Charter has recently come before this Court for review in another case entitled *Regan* v. *People of the State of New York*, on which argument was heard on November 18, 1954. By permission of this Court as *amicus curiae* brief was submitted on behalf of the City of New York on December 2, 1954. We respectfully refer the Court to the arguments advanced in the *amicus curiae* brief submitted in the *Regan* case urging the constitutionality of § 903.

No Substantial Federal Question Is Presented by the Attempted Appeal

I

We urge dismissal of the appellant's proposed appeal on the ground that there is no substantial Federal question presented. This Court has ruled that the terms and conditions of public employment and the right of tenure in state or municipal civil service do not present Federal questions unless such terms constitute a patently arbitrary or discriminatory exclusion from public service. *Weiman* v. *Updegraff*, 344 U. S. 183 (1952). In the *Weiman* case the Oklahoma statute made no distinction between innocent and knowing membership in a subversive organization. New York City Charter § 903 does not punish for innocent activity. It merely requires, as to certain pertinent matters, the employee's cooperation with a duly constituted body. Moreover, even if the appellant were able to demonstrate that there had been some curtailment of his civil rights as a private citizen, this Court has long recognized that the privileges and benefits of public employment permit corresponding restrictions designed to assure honest and loyal employees.

The New York state courts have interpreted § 903 of the New York City Charter to mean (1) that teachers in the public schools and colleges maintained by the City of New York are city employees within the meaning of § 903; and (2) that the Internal Security Sub-Committee of the United States Senate is a legislative body within the meaning of the statute. This Court has consistently ruled that it will be bound by the interpretation given to a state statute by the highest court of that state. *Barsky* v. *Board of Regents*, 374 U. S. 442, 448 (1954); *Winters* v. *New York*, 333 U. S. 507, 514 (1948); *Morley* v. *Lake Shore Railway Co.*, 146 U. S. 162, 167.

This Court has held consistently that public employ-

ment by a state or one of its municipalities is a matter of local concern, including the terms and conditions of such employment, the tenure rights and conduct of employees and the fixing of wages. The removal of a state or municipal employee from public employment does not present a federal question. *Preston* v. *Chicago*, 226 U. S. 447 (1913); *Walton* v. *House of Representatives of Oklahoma*, 265 U. S. 487 (1924).

No provision of the Federal Constitution deprives a state of power to modify or change the conditions of such employment as the public interest may warrant. *Higginbotham* v. *Baton Rouge*, 306 U. S. 535 (1939), rehearing denied 307 U. S. 649; *Dodge* v. *Board of Education*, 302 U. S. 74, 78-9; *Butler* v. *Penn.*, 10 How., 402, 416-7 (1850).

II

Assuming that the application of the provisions of New York City Charter § 903 to public employees in New York City minimizes in any degree their right to plead the Fifth Amendment as the basis for refusal to testify, such restriction is merely one factor which distinguishes public from private employment. In *Adler* v. *Board of Education*, 342 U. S. 485, 492, this Court reaffirmed the principle that the public employee, in exchange for such benefits as tenure, security and pension benefits, assume concurrent obligations, saying:

> "It is equally clear that they [teachers] have no right to work for the state in the school system on their own terms. [Case cited.] They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere."

The requirement of Charter § 903 that a public employee answer pertinent questions in a proper investigation

is in essence the same as the ordinance of the City of Los Angeles whereby public employees were required to foreswear that they did not advocate the unlawful overthrow of the government by force and violence and that they were not members of an organization which to their knowledge advocated the unlawful overthrow of the government by force and violence. Any employee who would not take such an oath was thereby precluded from further public employment. The Los Angeles ordinance is obviously designed to assure to the state loyal employees. Similarly, § 903 of the New York City Charter is calculated to protect the city against dishonest or disloyal employees. The constitutionality of the Los Angeles ordinance was passed on by this Court in *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716 (1951). This Court said (p. 720):

> "The provisions operating thus prospectively were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States. Cf. *Gerende* v. *Board of Supervisors of Elections*, 341 U. S. 56 (1951). Likewise, as a regulation of political activity of municipal employees, the amendment was reasonably designed to protect the integrity and competency of the service. This Court has held that Congress may reasonably restrict the political activity of federal civil service employees for such a purpose, *United Public Workers* v. *Mitchell*, 330 U. S. 75, 102-103 (1947), and a State is not without power to do as much."

This same principle found its first and often quoted enunciation in the words of Mr. Justice HOLMES in *McAuliffe* v. *New Bedford*, 155 Mass. 216, 220:

> "The petitioner [a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of

free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control."

The same principle of legislative control and establishment of reasonable qualifications has been applied to professions so coupled with the public interest as to require licensing by the state. This Court has upheld the fixing of certain requirements for the continued practice of such professions as medicine in *Dent* v. *West Virginia*, 129 U. S. 114 (1889), wherein the standards for practice were elevated, and in *Hawker* v. *New York*, 170 U. S. 189 (1898), wherein a statute prohibited the practice of medicine by any person convicted of a felony. See also *Barsky* v. *Board of Regents*, 347 U. S. 442 (1954).

WHEREFORE, appellee respectfully moves that the within appeal be dismissed or that the judgment and decree of the courts of the State of New York herein be affirmed.

Dated: N. Y., January 3, 1955.

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APPEL-
LEE'S
BRIEF

Supreme Court of the United States

OCTOBER TERM, 1955

No. 23

HARRY SLOCHOWER,
Appellant,

vs.

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Statement of Case

The Internal Security Sub-Committee of the Committee on the Judiciary of the United States Senate met in New York City on September 8, 1952 to examine into the existence of subversive infiltration of the public school system. The Committee placed upon the record the source of its authority and the scope of its powers (R. 15). As summarized by its then Chairman, Senator Homer Ferguson, the purpose of the investigation was stated as follows (R. 15):

> "We are here today to take testimony relating to subversion in our educational process. The training of our youth today determines the security of the nation tomorrow. The nature of this inquiry will be national in scope, and will relate to determine whether or not organized subversion is undermining our educational system.

> We shall endeavor to sketch a broad general picture, leaving the determination of individual cases to state and local authorities.
>
> The subcommittee gives full recognition to the fact that education is primarily a state and local function. Hence, the subcommittee has limited itself to considerations affecting national security, which are directly within the purview and authority of the subcommittee."

On October 13, 1952, at a continued hearing, an attorney for one of the witnesses attempted to have the subcommittee concede that it was not concerned with the property, affairs or government of New York City or with the official conduct of city employees. In refusing to so limit the inquiry Senator Ferguson further stated (R. 17-18):

> "I think that is a fair statement, that we are not trying to dictate to the school board who they shall have as teachers, what they shall teach. But we do think that the security of this nation is determined by what teachers do teach, *whether or not they follow the Communist line in teaching, whether or not they are members of the Communist Party*, because the evidence seems to indicate clearly, up to date at least, and it has not been disputed by those who have been Communists, that the Communists owe allegiance to the Soviet Union and the Communist Party, and that when it conflicts in any way with the United States Government or the people, that Communism and Russia controls their thinking. I think that is very material as to our security." (Emphasis supplied.)

Pursuant to subpoenas duly served upon them, fourteen teachers in the employ of either the Board of Education or the Board of Higher Education of the City of New York appeared before the Committee on September 10, September 23, September 24 or October 13, 1952.

After being duly sworn, each teacher was asked among other questions whether he was or ever had been a member of the Communist Party. Each witness except the appellant Slochower invoked the Fifth Amendment in refusing to answer any questions concerning present or past membership in the Communist Party. The petitioner Slochower, who appeared on September 24, 1952 accompanied by counsel, answered to the extent that he denied present membership in the Communist Party, but invoked the Fifth Amendment when questioned concerning membership prior to 1941 (R. 27-38).

Section 903 of the New York City Charter provides that if any employee of the city shall appear before any legislative committee and refuse to answer any questions relating to his official conduct on the ground that his answer would tend to incriminate him, his employment shall terminate and he shall not be eligible for any further employment by the city. Each of the Boards received certified copies of the transcript of the testimony of each of the teachers in its employ. The transcripts furnished to the Boards apprised them that questions concerning the teachers' official conduct had been asked by a duly constituted legislative committee, and that each teacher had refused to answer such questions on the grounds of possible self-incrimination. Accordingly the Boards declared vacant the positions of each of the teachers, including that of the petitioner Slochower.

An action to review these dismissals was commenced in the New York State Supreme Court. The applicability of § 903 was sustained by that Court as well as by the Appellate Division and the Court of Appeals. Notice of appeal to this Court was served on behalf of all the teachers involved. Thereafter, this Court noted probable jurisdiction with respect to the appellant Slochower and dismissed the appeals of the other teachers for want of a properly presented Federal question.

The Statute Involved

New York City Charter, § 903 provides as follows:

> **"Failure to testify.** If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refu or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

Opinions Below

The petitioner challenged his dismissal in a proceeding in the New York State Supreme Court, 202 Misc. 915 (Kings Co., 1952). The Court found that petitioner was a city employee within the contemplation of New York City Charter § 903, that a federal legislative committee was among the legislative committees contemplated by the section and that the questions relating to past membership in the Communist Party had a direct bearing on his official conduct. Accordingly, the petition was dismissed (R. 38-46).

Petitioner appealed to the Appellate Division of the Supreme Court of the State of New York, 282 App. Div. 717 (2nd Dept., 1953). That Court was unanimous in holding that Charter §903 was applicable to a federal legislative committee and that questions as to past Communist Party membership related to an employee's official conduct. Two of the five judges dissented on the question of whether or not an employee of the Board of Higher Education was a city employee within the contemplation of Charter §903. The majority and dissenting opinions are found at R. 49-52.

The New York State Court of Appeals reviewed the dismissal of the petitioner and affirmed the determinations of the lower courts, 306 N. Y. 532 (1954). The Court was unanimously of the opinion that Communism in the United States is a conspiracy against our Government and that an inquiry into past or present membership in the Communist Party is an inquiry regarding the official conduct of an employee of the City of New York. The Court further unanimously agreed that loyalty to our Government goes to the very heart of official conduct in service rendered in all branches of Government, local as well as national. The majority of the Court also found that within the purview of Charter §903 the petitioner was an employee of the City of New York and that a federal legislative committee was encompassed within the term "any legislative body". The minority dissented on these two latter conclusions (R. 52-65).

Upon a subsequent motion by the petitioner the Court of Appeals denied permission to reargue but granted the alternative request for relief by amending the remittitur so as to frame a federal question, 307 N. Y. 806 (1954) (R. 67-68). The court in denying the motion ruled unanimously that the petitioner had not been denied due process under the Fourteenth Amendment of the United States Constitution. (R. 68).

Questions Presented

(1) May the appellant raise in this Court a Federal constitutional question which he failed to raise in the state courts?

(2) May the state, cognizant of the benefits, tenure and stability of public employment, and endeavoring to secure the full cooperation of its personnel on matters affecting loyalty to the state and nation, establish as a qualification of employment that on matters affecting their official conduct employees may not invoke the privilege of self-incrimination as a basis for refusal to testify before duly constituted government bodies?

Summary of Argument

The appellant's principal claim in this Court is that New York City Charter § 903, is violative of his constitutional rights in that it deprives him of his position as a teacher because he invoked the privilege against self-incrimination in refusing to testify before a congressional committee.

In the state courts, the petitioner did not raise any claim with reference to the Fifth Amendment. The petitioner did refer to that portion of the Fourteenth Amendment which relates to due process. However, no claim made in the state courts by the petitioner was based on that portion of the Fourteenth Amendment prohibiting the states from abridging the privileges or immunities of citizens.

We contend that the claimed violation of the constitutional privilege against self-incrimination now urged by the petitioner was not properly raised by him in the state courts and that the invocation of a portion of the Fourteenth Amendment cannot serve to bolster the petitioner's claim with reference to the Fifth Amendment.

As to the balance of the petitioner's argument, as well as the merits of his claim concerning the Fifth Amendment, if that is properly before the Court, our contention is that the state has the right to take steps reasonably designed to ensure honesty and loyalty in its employees.

Charter § 903 came into being as the result of an official investigation by a committee of the state legislature with respect to corruption in New York City. One of the recommendations which grew out of that investigation was that public employees should not be permitted to hide behind the privilege of self-incrimination and continue in public office.

Public employment in New York State confers advantages with concurrent obligations which include cooperation with the duly constituted authorities. The state has a right to adopt any measures which are reasonably calculated to ensure honesty and loyalty among its employees in matters relating to official conduct. Section 903 bears a reasonable relationship to the evil sought to be curbed, meets the standards prescribed by this Court with reference to similar statutes, and does not constitute a denial of due process to the petitioner.

POINT I

The appellant did not raise in the state courts the question as to whether New York City Charter § 903 is violative of the constitutional privilege against self-incrimination.

The petitioner in his notice of appeal to this Court states that the first question to be considered is as follows:

> "1. Whether Section 903 of the New York City Charter contravenes the Fifth Amendment to the Constitution of the United States in that it imposes

as a condition to public employment, the surrender of the Federal Constitutional right to refuse to be a witness against one's self."

However it should be noted that the remittitur of the Court of Appeals makes no reference to any such federal question and does not mention the Fifth Amendment at all. The Court of Appeals stated the constitutional questions raised before it as follows (R. 67-68):

"Questions under the Federal Constitution were presented and passed upon by the Court of Appeals, viz., whether the rights of petitioner-appellant Slochower to due process under the Fourteenth Amendment to the Federal Constitution were violated by the construction and application herein of New York City Charter section 903, in that petitioner-appellant Slochower claims: (1) that the automatic operation of section 903 deprives him of tenure and of a trial to which he was entitled; (2) that the congressional sub-committee was not empowered to consider and specifically stated that its questions would not be directed to official conduct of city employees and that petitioner-appellant Slochower, therefore, could not have known at the time of the inquiry that the questions asked of him and which he refused to answer related to his official conduct; and (3) that at the time of the inquiry, there had been no determination under the Feinberg Law that the Communist Party was a 'subversive' organization, so that membership therein would affect a teacher's eligibility and that the retroactive application of that determination is constitutionally prohibited. The Court of Appeals held that petitioner-appellant Slochower was not denied due process under the Fourteenth Amendment."

The fact is that at no time in any of the state courts was any reference to the Fifth Amendment made by the

petitioner. In his brief to the Court of Appeals petitioner did assert that he "was deprived of property rights without due process of law, in violation of Article I, §10, and the Fourteenth Amendment of the United States Constitution * * *." He then argued that the right to government employment is a property right within the protection of the Federal Constitution citing *Wieman* v. *Updegraff*, 344 U. S. 183 (1952) and *United States* v. *Lovett*, 328 U. S. 303 (1946). The appellant then proceeded to argue: "It is a fundamental principle of justice that punishment may not be meted out for offense against a law unless those subject to the law are afforded a reasonable opportunity to learn what is prohibited. *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Winters* v. *New York*, 333 U. S. 507; *Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233, 239" (Appellant's brief to Court of Appeals, pp. 20-22).

An examination of the petitioner's references to the Fourteenth Amendment makes it clear that they did not contain even an oblique reference to the Fifth Amendment. Petitioner's entire argument was confined to that portion of Section I of the Fourteenth Amendment which provides "nor shall any state deprive any person of life, liberty or property without due process of law". At no time did the appellant urge as he does in this Court that Charter §903 was in conflict with the provision "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

This Court has consistently ruled that the particular federal constitutional question presented to the United States Supreme Court must have been raised in some unmistakable manner for review by the state court. The appellant did not argue the question of possible conflict between Charter §903 and the Fifth Amendment in the New York Courts. Accordingly it should not be considered by this Court.

The foremost case enunciating this principle is *Deacon* v. *Des Moines*, 173 U. S. 193 (1899), in which the appellant urged in the Iowa state court that the due process portion of the Fourteenth Amendment was violated when a personal judgment was returned against him, a resident of Illinois, for a road improvement which was assessed upon abutting property owned by the appellant in Iowa. On appeal to this Court, the appellant argued that the judgment was unconstitutional, not only for the reason he had advanced in the Iowa court, but also because the assessment was placed against his property without regard to benefit, and exceeded the actual value of the property assessed. He contended this constituted a taking of private property without just compensation, in violation of the due process required under the Fourteenth Amendment. This Court ruled that this latter question, not having been urged in the state courts, could not be considered on the appeal even though it involved a question under the due process clause of the United States Constitution.

This Court said (p. 199):

> "Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the state court which at least would call its attention to the Federal question as one that was relied on by the party, and then, if the decision of the court, while not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient. * * *
>
> * * * * *
>
> It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a Federal nature. *Hamilton Company* v. *Massachusetts*, 6 Wall. 632. In order to be available in this court some claim or right must have been

asserted in the court below by which it would appear that the party asserting the right founded it in some degree upon the Constitution or laws or treaties of the United States."

This Court cited *Deacon* v. *Des Moines*, *supra*, with approval, in *Wilson* v. *Cook*, 327 U. S. 474 (1946), and at pp. 483-484 reasserted the rule of that case:

> "In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented. * * * For, as we said in *McGoldrick* v. *Compagnie Generale*, 309 U. S. 430, 434-435, * * * Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. * * *"

See also:

Adler v. *Board of Education*, 342 U. S. 485 (1952)
and
State Farm Ins. Co. v. *Duel*, 324 U. S. 154 (1945).

POINT II

The State, which has assured public employees selection on the basis of merit as well as tenure in their positions, may create conditions of employment reasonably calculated to assure honesty and loyalty in its employees.

1. **Public employment in New York State offers advantages with concurrent obligations which includes cooperation with duly constituted authorities.**

The Constitution of the State of New York provides that positions in the state and municipal service shall be filled on the basis of merit and fitness demonstrated by examination which, where practicable, is to be competitive (Art. V, § 6).

Implementing this constitutional mandate the New York State Legislature has established a civil service system whereby employees entering state or municipal service are assured continued employment provided they render good, loyal and faithful service. In order to guarantee this status the state has established by statute certain rights of tenure and protection against arbitrary dismissal, e. g., Civil Service Law § 22 (Cons. Laws, ch. 9); Education Law §§ 2573, 6206 (Cons. Laws, ch. 16); Administrative Code of the City of New York §§ 434a-14.0, 437a-12.0. It is thereby apparent that the state has created a status for its employees which is far more favorable than that enjoyed in private industry.

In order to protect the state from disloyal or dishonest employees the legislature concurrently established certain requirements such as good character and moral fitness, to be met prior to employment, which exclude persons

guilty of crimes, notoriously bad conduct or addiction to harmful habits (Civil Service Law § 14). Other requirements, if not complied with, terminate existing employment (New York City Charter § 887 payment of money for appointment or nomination; § 895 dual office-holding; § 896 officer or employee converting public property to his own use; § 901 accepting bribes. For the convenience of the Court the full text of these sections is printed in Appendix A of this brief, pp. 35-36).

New York City Charter § 903 is a part of this general plan designed to assure the state of loyal employees. The statute has for its purpose the assurance of the necessary cooperation by a public employee in any proper inquiry by an authorized investigating body inquiring into matters affecting the city or the official conduct of the employee.

2. Historical background of Charter § 903.

Pertinent to a consideration of the constitutionality of New York City Charter § 903 is a brief review of the background and history of the section. The present Charter of the City of New York was prepared by a Charter Revision Commission created by the State Legislature (L. 1934, ch. 867), and was submitted to the people at the 1936 general election. It was adopted and became effective on January 1, 1938.

In large measure, the enactment of a new charter was the outgrowth of an investigation into alleged corruption in the government of New York City in the course of which numerous city employees refused to testify as to official acts on the ground that their testimony would tend to incriminate them. The spectacle of city officers and employees resting on their constitutional right against self-incrimination brought about a realization on the part of proponents of Charter reform and the general citizenry

that public servants should not be permitted to remain on taxpayer-supported payrolls if they refused on the basis of self-incrimination to answer questions relating to official conduct before duly empowered investigating agencies. The effective way to accomplish the desired change was to incorporate corrective provisions in the charter. As stated in a final report entitled *In the Matter of the Investigation of the Departments of the Government of the City of New York, Final Report by Samuel Seabury*, December 27, 1932, pp. 9-10:

> "My first and principal recommendation therefore is:
>
> "THE CHARTER OF THE CITY OF NEW YORK SHOULD BE REVISED IN CERTAIN FUNDAMENTAL AND BASIC RESPECTS HEREINAFTER MENTIONED.
>
> "The Joint Legislative Committee was constituted to investigate the affairs of the government of the City of New York. It was not designed to be a charter revision committee. As the work of the Committee progressed, it became apparent, however, that the defects in the government of the City of New York were not exclusively personal to its officials, but that the difficulty lay deeper. It became apparent that the very form and structure of the city government was in a large measure responsible for the opportunities for graft and corruption which were disclosed before the Committee."

The drafters of the City Charter, in the light of these recommendations, prepared Chapter 40, including § 903, which regulates the rights and corresponding obligations of the city's employees.

3. The provisions of Charter § 903 have a reasonable relationship to the evil to be curbed.

(A)

The obligation of every citizen is to testify before lawful tribunals. Professor Wigmore summed up this obligation as follows:

> "For three hundred years it has now been recognized as a fundamental maxim that the public * * * has a right to every man's evidence. * * * It is a duty not to be guided or evaded. Whoever is impelled to evade or resent it should retire from the society of organized and civilized communities, and become a hermit. He is not a desirable member of society." (4 WIGMORE, *Evidence*, § 2192 [2nd ed., 1923].)

One of the few permitted exceptions to this general rule is that a person may not be compelled to give evidence which may tend to implicate him in a crime. The invoking of this privilege by an employee of the state in refusing to answer a question which has bearing on his official conduct permits only two possible inferences either of which disqualify: (1) the answering of the question would tend to prove the witness guilty of a crime in some way connected with his official conduct; or (2) in order to avoid answering the question propounded, the witness deliberately chose to commit perjury by falsely swearing that the answer would tend to incriminate him. Clearly, when an employee retreats behind this privilege he alone knows which alternative prompted the invoking of the privilege. Chief Justice MARSHALL summed it up in *United States v. Burr, In re Willie*, 25 Fed. Cas. 38 (1807) at p. 40:

> "When a question is propounded, it belongs to the court to consider, and to decide whether any direct answer to it can implicate the witness. If this be

decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it *may criminate himself*, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be; * * *. *If, in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact. If the declaration be untrue, it is in conscience and in law as much a perjury as if he had declared any other untruth upon his oath;* * *." (Emphasis supplied.)

The Court continuing, stated the rule as follows (pp. 40-41):

"The gentlemen of the bar will understand the rule laid down by the court to be this: It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case the witness must himself judge what his answer will be; and if he say on oath that he cannot answer without accusing himself, he cannot be compelled to answer."

See also *Mason* v. *United States*, 244 U. S. 362 (1917), in which this Court cited with approval *United States* v. *Burr*, *In re Willie*, *supra*, and wherein the Court asserted that there must be some apparent connection between the question asked and a danger of providing a link with a crime.

A witness may not use the privilege as a shield to protect his apparent good name. In *Brown* v. *Walker*, 161 U. S. 591 (1896), this Court stated at p. 605-606:

> "The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of criminal charge. If he secure legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good."

In virtually all the Courts, both Federal and State, the individual has been protected pursuant to the Constitutional privilege, from giving information which may be used to establish his guilt of a crime. In most of the states the protection under the privilege has included the preclusion of any reference during a criminal trial to the fact that a defendant failed to take the witness stand to answer the accusation.* This privilege is obviously an exception to the general rule that the public has a right to every man's evidence. The privilege should be strictly construed and the inference which ordinarily flows from failing to meet an accusation in a proper forum should apply if it will not tend to convict the invoker of a crime. See: 8 WIGMORE, *Evidence* § 2192, subd. 3 (3rd ed. 1940).

In *United States* v. *Mammoth Oil Co.*, 14 F. 2d 705 (8th Cir. 1926), aff'd 275 U. S. 13 (1927), the government sued to cancel certain oil leases on the ground of a bribe by the Sinclair Oil Company to a government official.

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* However, see *Adamson* v. *California*, 332 U. S. 46 (1947), in which prosecutor and trial judge were permitted by State law to comment on the accused's failure to testify; *Palko* v. *Connecticut*, 302 U. S. 319, 325-326 (1937) (state statute allowing appeal by State in criminal cases); *Twining* v. *New Jersey*, 211 U. S. 78 (1908) (instruction by Court to jury that the jury may in a criminal case draw an unfavorable inference from the defendant's failure to testify).

One of the witnesses for the oil company invoked the Fifth Amendment. The Court clearly ruled that certain inferences must flow from his invocation of the privilege in a civil proceeding, stating in part (p. 729):

> "Why is silence the answer of a former cabinet officer to the charge of corruption? Why is silence the only reply of Sinclair, a man of large business affairs, to the charge of bribing an official of his government? *Why is the plea of self-incrimination—one not resorted to by honest men—the refuge of Fall's son-in-law, Everhart?* . . . Men with honest motives and purposes do not remain silent when their honor is assailed . . . Is a court compelled to close its eyes to these circumstances? . . . These gentlemen have the right to remain silent, to evade, to refuse to furnish information, and thus to defy the government to prove its case; but a court of equity has the right to draw reasonable and proper inferences from all the circumstances in the case, and especially from the silence of Secretary Fall and the failure of Sinclair to testify." (Emphasis supplied.)

The President of the United States by Executive Order 10491, dated October 13, 1953, ruled that the invoking of the privilege by a federal employee raised a question as to the employee's loyalty. He directed that:

> "Subsection (a) of section 8 of Executive Order No. 10450 of April 27, 1953 relating to security requirements for Government employment, is hereby amended by adding thereto at the end thereof paragraph (8) as follows:
>
> '(8) Refusal by the individual, upon the ground of constitutional privilege against self-incrimination, to testify before a congressional committee regarding charges of his alleged disloyalty or other misconduct.'"

Section 8 of Executive Order 10450 indicates some of the things which are to be taken into consideration in determining whether or not an employee is a safe security risk. The pleading of the privilege is classed with such acts as criminal or infamous conduct, sabotage, association with spies, advocacy of the violent overthrow of the government, membership in an organization seeking such a goal, unauthorized disclosure of information and acting in the interest of a foreign government.*

The State should be under no greater disability than a private employer in being able to assure itself of loyal and trustworthy employees. Under similar circumstances the New York Times, a publication which has been in the forefront in the defense of civil liberties, dismissed a member of its staff for invoking the Fifth Amendment before the Senate Internal Security Sub-Committee.**

As we have already pointed out, *supra*, pp. 14-18, the refusal to answer on the basis of possible self-incrimina-

* See also *Christal* v. *San Francisco*, 33 Cal. App. 564; 92 P. 2d 416 (1939), wherein police officers were dismissed for invoking the privilege even in the absence of a statute or regulation conditioning continued employment on cooperation; *Holt* v. *State*, 39 Tex. Cr. 282, 45 S. W. 1016 (1898), a criminal case wherein an already acquitted conspirator's credibility was attacked for having invoked the privilege on his own trial; *Childs* v. *Merrill*, 66 Vt. 302, 29 Atl. 532 (1894) in which the defendant had invoked the privilege when his deposition before trial was taken. On the trial the privilege being no longer available due to the running of the statute of limitations, the defendant was compelled to testify and the plaintiff was permitted to show he had invoked the privilege since it tended to show an admission of guilt.

** New York Times, July 14, 1955.
The letter dismissing the employee reads as follows:

"Dear Mr. Barnet:

I have learned to my regret that at your appearance today before the Senate Internal Security subcommittee you refused to answer questions put to you in connection with your

tion must mean either that the employee believes his answer would tend to prove him guilty of a crime or that he has no reason to believe that his answer will incriminate him, in which latter event the invocation of the privilege is perjurious. The enactment of Charter § 903 is the equivalent of a determination that in either case the employee is not fit to continue in the public service.

The reasons which prompt a witness to invoke the privilege against self-incrimination cannot be ascertained with certainty since such reasons rest in the mind of the witness. However, the least that can be said with respect to the invocation of the privilege is that it tends to show an admission of guilt. The high standards which a state has the right to exact from its employees, and the necessity that such employees be above suspicion furnishes a sufficient basis for the enactment of § 903.

The legislature in extending this requirement of cooperation by employees to a federal investigating committee was mindful that there are many areas where there is a dovetailing of city, state and federal purposes. For instance the Congress makes federal funds available for use by the states and cities for welfare relief, public housing, etc. The Senate Committee, instead of investigating nation wide subversion of the nation's educational institutions, could have as readily been investigating money grants under a Title I housing grant.

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alleged association with the communist party. The course of conduct which you have followed since your name was first mentioned in this connection culminating in your action today has caused The Times to lose confidence in you as a member of its news staff. Accordingly, this will serve as notice of termination of your employment.

I have requested the auditor to pay any sums that may be due you.

Yours truly

Arthur Hays Sulzberger."

A New York City Housing Authority employee could be called upon by a Senate Committee to answer for a fraudulent allocation of federal funds. The definite relationship between the employee's official conduct and the inquiry are immediately apparent. Obviously a retreat behind the privilege against self-incrimination is incompatible with being continued as a trusted employee.

In the instant case the objective of the Senate Committee was to investigate Communist infiltration in the nation's educational system. Clearly, the question of past or present Communist Party membership by teachers and their loyalty to the nation and the state are of vital concern both to the Senate Investigating Committee and the state which employs the teacher.

(B)

This Court in *Barsky v. Board of Regents*, 347 U. S. 442 (1954), upheld the right of the New York State legislature to provide for the disciplining of a doctor licensed by the state, for conviction of a federal crime in a federal court, even though the act committed by the doctor was not a crime under the law of New York. The appellant in that case argued that his conviction did not afford the state a basis for suspending his license. This Court ruled (p. 448) "that issue was settled adversely to him by the Court of Appeals of New York and that Court's interpretation of the state statute is conclusive here."

Accordingly, the rulings of the New York Court of Appeals that (1) the New York legislature included a United States Senate Committee within the term "any legislative committee" and precluded an employee from invoking the privilege against self-incrimination to an inquiry relating to official conduct and (2) that a ques-

tion as to past party membership has a bearing on the employee's official conduct, are conclusive on this Court.

The appellant has endeavored to raise a doubt as to the relationship between questions on past Communist Party membership and official conduct by asserting that the Communist Party prior to 1941 was not the Communist Party as it is known today. The soundness of the conclusion of the Court of Appeals on this question was demonstrated in *Dennis* v. *United States*, 341 U. S. 494 (1951) [Record on appeal, pp. 1504-06; 1725; 1860-64; 1972-89; 1990-92]. The aims and purposes of the Communist Party for violent overthrow of the government and the establishment of the dictatorship of the proletariat remain constant—it is only the facade that varies. The proof adduced by the government showed that the defendants dissolved the Communist Political Association to reindoctrinate its members to the avowed revolutionary aims which existed all during the years *prior* to 1943 when the Communist Political Association was formed. See also Report of Subversive Activities Control Board on Communist Party U. S. A. 83d Congress (Document No. 41) Determination of the Board affirmed *Communist Party of United States* v. *Subversive Activities Control Board* 223 F. 2d 531 (1954) appeal pending in this Court. This Board during an exhaustive hearing established that the Communist Party prior to 1941 and during the ensuing years (with the possible exception of the term of the Communist Political Association 1943-1945) was dedicated to the violent overthrow of the government as well as being under the continual domination of the Communist International.

It is significant to note that the "Report of the New York Legislative Sub-Committee Relative to the Public Educational System of the City of New York," Legislative Document #49 (1942), commonly known as the Coudert Committee, demonstrated not only that the Communist Party was dedicated to forceful overthrow of the

government but was also alarmingly successful in infiltrating the New York City Educational Systems between 1935 and 1941 (pp. 101-108, 155-157, 178-290).

Equally untenable is the appellant's assertion that in September, 1952, when he appeared before the Committee accompanied by an attorney, he could not have known that a question as to his past Communist Party membership would have any bearing on his official conduct. Approximately a year prior to that date, this Court, in *Garner* v. *Los Angeles*, 341 U. S. 716, 719, 720 (1951), which will be discussed more fully *infra*, sustained a municipal requirement that an employee fill out an affidavit "stating whether or not he is or ever was a member of the Communist Party of the United States of America * * *". A dismissal for refusing to execute the affidavit was sustained and the relationship of such a question to official conduct recognized.

In any event the appellant is the only one who knows what the nature and character of his acts were prior to 1941 and whether they might be a basis for a criminal prosecution against him. The Senate Committee took his invocation of the privilege at face value. It would be an odd turn of justice if an employee could by pleading self-incrimination refuse to cooperate with a duly constituted legislative body on questions having to do with his official conduct and at the same time remain secure in his position. The enactment of Charter § 903 was not designed to impinge on a right granted by the United States Constitution but rather to assure the state of loyal honest law-abiding employees.*

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* For a discussion and analysis of the history and problems of the Fifth Amendment see 24 Fordham Law Review 19 "Problems of the Fifth Amendment" by C. Dickerman Williams.

4. The appellant was not denied due process.

The argument is made that Charter §903 violates the due process guaranteed to this appellant by the Fourteenth Amendment of the United States Constitution in that he was not notified that there were charges against him—he was not afforded an opportunity at a trial or to hear evidence against himself or to offer a defense. An examination of §903, which has been in effect since 1938,* reveals that the state legislature removed the area of discretion from the heads of the administrative agencies and clearly provided that the invoking of the priviilege against self-incrimination to a question relating to the employee's official duty is inconsistent with public employment. There was nothing to try. What witnesses could be presented? The appellant is the person who triggered the statute into action.

Judge Conway, writing for the New York Court of Appeals in the instant case (R. 54), points this out very clearly.

> "Section 903 is inoperative if the teacher gives either an affirmative or negative answer to the question posed—even though the answer be false. The effect of the answer on the teacher's fitness to continue teaching is for the board of education or of higher education, and those bodies only, to say. See-

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* In *Matter of Koral* v. *Board of Educ. of City of New York*, 197 Misc. 221 (Supreme Court, N. Y. County, 1950, Pecora, J.), Charter §903 had been judicially interpreted to apply to a Board of Education employee who invoked the Fifth Amendment when questioned by a congressional committee about participation in a Communist espionage ring. Accordingly, the appellant could not claim that he was unaware that §903 might be held applicable to employees of the Boards of Education and Higher Education.

See also *Matter of Goldway* v. *Board of Higher Education*, 178 Misc. 1023 (Supreme Court, N. Y. County, 1942, Hofstadter, J.).

tion 903 becomes applicable only if the teacher witness refuses to answer upon the ground that the answer would tend to incriminate him or her. The teacher alone possesses the power to bring the statute into play. The assertion of the privilege against self incrimination is equivalent to a resignation (*Matter of Koral* v. *Board of Educ. of City of N. Y.*, 197 Misc. 221)."

The sharp distinction between the instant situation and the facts in *Wieman* v. *Updegraff*, 344 U. S. 183 (1952), on which the appellant relies, is readily apparent. In the *Wieman* case, the Oklahoma Act provided for the disqualification of the employee for membership in an organization which advocated the overthrow of the government by force and violence, even though he was completely unaware and could not have readily known of these objectives of the organization. No distinction was made by the Oklahoma statute as interpreted by the highest court of that State, between innocent and knowing activity. In the instant case it is the employee who brings the privilege into play. It is he who raises the inference that his answer will provide a link in a chain of evidence to bring him within the penalties of the law. What prompts the employee to plead self-incrimination is peculiarly within his own mind. The inferences which properly flow from the invoking of the privilege provide a proper basis for disqualification.

The appellant was not without judicial remedy. He sought and received a determination from the courts as to whether or not he falls within the purview of § 903 of the New York City Charter. He contended that he was not a public employee, within the meaning of the statute; that the legislative body was not duly constituted to conduct the inquiry; that such inquiry does not properly relate to the property, government or affairs of the city, or the official conduct of its employees (New York Civil Practice

Act, Article 78 §§ 1283-1306). The New York Courts ruled adversely to the appellant on all these questions.

5. This Court has sustained the right of the State to protect itself by promulgating reasonable conditions of employment.

This requirement that a public employee answer pertinent questions in a proper investigation is in essence the same as the ordinance of the City of Los Angeles considered by this Court in *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716 (1951), whereby public employees were required to swear that they did not advocate the unlawful overthrow of the government by force and violence and that within the past five years they had not been members of an organization which to their knowledge advocated the unlawful overthrow of the government by force and violence. Any employee who would not take such an oath was thereby precluded from further public employment. The Los Angeles ordinance is obviously designed to assure loyal employees to the state. Similarly, § 903 of the New York City Charter is calculated to protect the city against dishonest or disloyal employees. This Court said (pp. 720-721):

> "The provisions operating thus prospectively were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States. Cf. *Gerende* v. *Board of Supervisors of Elections*, 341 U. S. 56 (1951). Likewise, as a regulation of political activity of municipal employees, the amendment was reasonably designed to protect the integrity and competency of the service. This Court has held that Congress may reasonably restrict the political activity of federal civil service employees for such a purpose, *United Public Workers* v. *Mitchell*, 330 U. S. 75, 102-103 (1947), and a State is not without power to do as much."

This Court also recognized the obligation of a public employee to answer questions as to past conduct which may have a bearing on present fitness (p. 120):

> "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid."

The *Garner* case was followed by the decision of this Court in *Adler v. Board of Education*, 342 U. S. 485 (1952), in which the right of a state or municipality to inquire and the obligation of the employee to answer questions having a direct bearing on an employee's merit and fitness was reasserted. This Court, referring to its determination in the *Garner* case, said (at p. 493):

> "We adhere to that case. A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employes as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty."

Prohibitions on the individual liberties of federal employees, as distinguished from private citizens were up-

held by this Court in *United Public Workers* v. *Mitchell*, 330 U. S. 75 (1945). This Court held constitutional the "Hatch Act" prohibiting Federal workers from engaging in partisan political activities. Mr. Justice Reed, writing the majority opinion for this Court, said (pp. 102, 103):

> "We have said that Congress may regulate the political conduct of government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the generally existing conception of governmental power. That conception develops from practice, history, and changing educational, social and economic conditions. * * * When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional."

See also: *Wieman* v. *Updegraff*, *supra*, wherein this Court reaffirmed the right of the State to exact reasonable requirements designed to guarantee loyal employees.

This same principle found its first and often quoted enunciation in the words of Mr. Justice Holmes in *McAuliffe* v. *New Bedford*, 155 Mass. 216 (1892), at p. 220:

> "The petitioner [a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as

> he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control."

This Court has recognized that the rights, privileges and immunities guaranteed by the United States Constitution are not absolute and unrelated to limiting circumstances. In *Dennis* v. *United States*, 341 U. S. 494 (1951), this Court speaking of the alleged unconstitutional impingement of the Smith Act on the rights of free speech, said (p. 508):

> "Speech is not an absolute, above and beyond control by the legislature when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction. Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. See *American Communications Assn.* v. *Douds*, 339 U. S. at 397. To those who would paralyse our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative."

See also *Feiner* v. *New York*, 340 U. S. 315. (1951); *Prince* v. *Massachusetts*, 321 U. S. 158 (1944); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1941).

In his brief (p. 13) the appellant relies on the decision of this Court in *Adams* v. *Maryland*, 347 U. S. 179 (1954), in support of his contention that the application of Charter 903 denies him a right guaranteed by the Constitution. The petitioner in the *Adams* case, in response to questioning before a federal investigating committee, admitted that he had maintained a gambling establishment in the State of Maryland. He was thereafter convicted in the State

courts of violation of anti-lottery laws on the basis of such testimony. This Court reversed the conviction on the ground that the very wording of the federal statute there being considered (18 U. S. C. § 3486) forbids the use of incriminating testimony given before a Congressional committee "in any criminal proceeding against him in any court". The holding in the *Adams* case was thus based not on the denial of a constitutional right but upon the construction of a federal immunity statute.

The petitioner also cites *Quinn* v. *United States*, 349 U. S. 565 (1955), in support of his position. That case has no bearing on the instant case. It simply asserts that a witness is entitled to the protection of the Fifth Amendment so long as it appears he is relying on the privilege even though not skillfully or accurately invoked.

The decision of this Court in *Frost Trucking Co.* v. *R. R. Com.*, 271 U. S. 583 (1926), relied on by the appellant, stands for the proposition that while a state may have unlimited discretion whether or not to grant a privilege, once having granted the privilege it cannot attach unreasonable or unlawful conditions to the exercise of the privilege. It has been demonstrated that Charter § 903 is reasonably calculated to separate disloyal employees from state service. Accordingly the *Frost* case has no application to the instant case. See *Watson* v. *Employers Liability Corp.*, 348 U. S. 66 (1954).

The appellant in the *Garner* case, *supra*, urged, as does the appellant herein, that the Los Angeles ordinance was a Bill of Attainder. In disposing of the argument, this Court held (p. 722):

> "*Cummings* v. *Missouri*, 4 Wall. 277 (1867), and *Ex parte Garland*, 4 Wall. 333 (1867), the leading cases in this Court applying the federal constitutional prohibitions against bills of attainder, recognized that the guarantees against such legislation were

not intended to preclude legislative definition of standards of qualification for public or professional employment. Carefully distinguishing an instance of legislative 'infliction of punishment' from the exercise of 'the power of Congress to prescribe qualifications,' the Court said in *Garland's* case: 'The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life.' 4 Wall. at 379-389."

This Court distinguished the Los Angeles ordinance from the Congressional act found unconstitutional in *United States* v. *Lovett*, 328 U. S. 303 (1946) in the following language (p. 723):

> "Unlike the provisions of the [Los Angeles] Charter and ordinance under which petitioners were removed, the statute in the *Lovett* case did not declare general and prospectively operative standards of qualification and eligibility for public employment. Rather, by its terms it prohibited any further payment of compensation to named individual employees. Under these circumstances, viewed against the legislative background, the statute was held to have imposed penalties without judicial trial."

From an examination of § 903 of the New York City Charter, it is manifest that this section is not aimed at any specific individuals as in the *Lovett* case, or a well-defined class of individuals as in *Cummings* v. *Missouri*, 4 Wall. 277 (1866), nor does it punish for past acts.

The same principle of legislative control and establishment of reasonable qualifications has been applied to professions so coupled with the public interest as to require licensing by the state. This Court has upheld the fixing

of certain requirements whereby the standards for continued practice of medicine were elevated. *Dent* v. *West Virginia*, 129 U. S. 114 (1889). And in *Hawker* v. *New York*, 170 U. S. 189 (1898), a statute prohibiting the practice of medicine by any person convicted of a felony was upheld. See also *Barsky* v. *Board of Regents*, 347 U. S. 442 (1954).

When New York City Charter § 903 was enacted it provided not only that a public employee who refused to cooperate, based on a claim of self-incrimination, in effect resigned from public service, but also prescribed that such a person is unfit for further public employment. It is not unreasonable for the state, in the selection of its employees, to bar anyone who has by his assertion of the constitutional privilege against self-incrimination thwarted or attempted to hinder an investigation vital to the protection of the state. Similar provisions are found in the United States Code. See 18 U. S. C. 205, 216, 281, which involves acceptance of bribes by members of Congress; similarly 18 U. S. C. 202, acceptance of bribes by other governmental officials; and 18 U. S. C. 2381, which involves a permanent proscription from any opportunity to serve in the government for anyone convicted of treason.

The appellant asks this Court to rule that Charter § 903 is unconstitutional in that he claims it is a violation of the right of due process guaranteed under the Fourteenth Amendment to the Federal Constitution. He urges the invalidity of the entire statute not only because it provides for forfeiture of present public employment but primarily because it has made him ineligible for any future public employment under the State or City of New York.

Without conceding the validity of petitioner's argument, we urge that this permanent proscription feature is readily separable from the remaining provisions of the statute. The New York Court of Appeals has frequently ruled

that it favors severability of the various parts of a statute so that any objectionable feature can be stricken out, leaving for enforcement the remaining and valid sections. *People* v. *Mancuso*, 255 N. Y. 463, 473 (1931); *People ex rel Alpha P. C. Co.* v. *Knapp*, 230 N. Y. 48, 60 (1920). No separate attack on the permanent restriction from employment was advanced by the petitioner in the Court of Appeals or any of the lower courts of the State of New York. For that reason alone, the appellant may not attack the constitutionality of this provision of the statute in this Court for the first time.

Severability of a statute is a question of interpretation of legislative intent which rests with the State courts where a State statute is involved. Had the petitioner made an argument in the state courts similar to the one now advanced, if those courts agreed with him they might well have severed that portion of the statute proscribing future public employment and declared it invalid without invalidating the entire statute.

CONCLUSION

The order appealed from should be affirmed.

New York, September 23, 1955.

Respectfully submitted,

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APPENDIX A

New York City Charter, Laws of 1934, Chapter 867, Adopted by Referendum on November 3, 1936, Effective January 1, 1938.

§ 887. Corrupt Practices.—No councilman or other officer or employee of the city shall give or promise to give any portion of his compensation or any money or valuable thing to any person, in consideration of his having been or being nominated, appointed, elected or employed as such officer or employee, under the penalty of forfeiting his office or employment and being forever disqualified from being elected, appointed or employed in the service of the city, and shall on conviction be punished for a misdemeanor.

§ 895. Officer Not to Hold Any Other Civil Office.—Any person holding office, whether by election or appointment, who shall, during his term of office, accept, hold or retain any other civil office of honor, trust or emolument under the government of the United States, except commissioners for the taking of bail, or of the state, except the office of notary public or commissioner of deeds or officer of the national guard, or who shall hold or accept any other office connected with the government of the city, or who shall accept a seat in the legislature, shall be deemed thereby to have vacated any office held by him under the city government; except that the mayor may accept, or may in writing authorize any other person holding office to accept, a specified civil office, in respect to which no salary or other compensation is provided. No person shall hold two city or county offices, except as expressly provided in this charter or by statute; nor shall any officer under the city government hold or retain an office under a county government, except when he holds such office ex officio by virtue of an act of the legislature,

and in such case shall draw no salary for such ex officio office.

§ 896. Fraud of Officer.—Any councilman or other officer or employee of the city who shall wilfully violate or evade any provision of law relating to his office or employment, or commit any fraud upon the city, or convert any of the public property to his own use, or knowingly permit any other person so to convert it or by gross or culpable neglect of duty allow the same to be lost to the city, shall be deemed guilty of a misdemeanor and in addition to the penalties imposed by law and on conviction shall forfeit his office or employment, and be excluded forever after from receiving or holding any office or employment under the city government.

§ 901. Punishment for False Returns and Deceptive Reports.—Any officer or employee of the city who shall knowingly make a false or deceptive report or statement in the course of his duty or shall, except as in this charter otherwise provided, receive compensation except from the city for performing any official duty, or shall accept or receive any gratuity from any person whose interests may be affected by his official action, shall be guilty of a misdemeanor and if convicted shall forfet his office or employment.